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JAMES H. McKENNEY,
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No. 308.

Opp. of Guthrie, Mayes, Fentress &

MISSISSIPPI TAX CASES.

Dickinson for Appellant.

Supreme Court of the United States.

OCTOBER TERM, 1899.

Filed April 4, 1900.

No. 308.

ILLINOIS CENTRAL RAILROAD COMPANY,
Appellant,

vs.

WIRT ADAMS, State Revenue Agent, *et al.*

Appeal from the Circuit Court of the United States for the Southern District of Mississippi.

BRIEF FOR APPELLANT.

WILLIAM D. GUTHRIE,
EDWARD MAYES,
NOEL GALE,
For the appellant.

JAMES FENTRESS,
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Of counsel.

WASHINGTON, October Term, 1899.

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ILLINOIS CENTRAL RAILROAD COMPANY,
Appellant,

vs.

WIRT ADAMS, State Revenue Agent, *et al.*

Appeal from the Circuit Court of the United States for the Southern District of Mississippi.

BRIEF FOR APPELLANT.

This appeal presents for review a final decree of the Circuit Court of the United States for the Southern District of Mississippi (record, p. 43) which dismissed the bill of complaint for want of jurisdiction. The appeal was prayed and allowed under section 5 of the act of March 3, 1891 (*id.* pp. 44, 45), and the judge holding the circuit court certified as follows:

"The question of the jurisdiction of this court was in issue in said cause upon the grounds hereinbefore stated, namely:

"1. That the complainant in its original bill showed no jurisdiction on the ground of diversity of citizenship. Defendants claim that its interest was derivative through the Canton, Aberdeen & Nashville, and that the complainant had no right to raise jurisdiction in the Federal courts by making the Canton, Aberdeen & Nashville Railroad Company a party defendant in the cause.

"2. That the complainant by its original bill showed no jurisdiction in this court because of the subject-matter stated, inasmuch as the bill set forth no particular Federal question.

"3. That there was no jurisdiction in this matter, because the bill was a suit against the State of Mississippi and in violation of the eleventh amendment to the Constitution of the United States.

"The court having dismissed the bill on the grounds of want of jurisdiction, the foregoing three questions arising upon the pleadings, the process, and the evidence are hereby certified to the Supreme Court of the United States for its decision, in conformity with the fifth section of the act of Congress of the year 1891" (record, p. 49).

Motions in this court to dismiss or affirm were submitted on November 6, 1899, and the decision postponed to the hearing on the merits. The jurisdiction of the circuit court is claimed on the ground that the suit is one "of a civil nature, . . . in equity, where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars, and *arising under the Constitution or laws of the United States.*"[1] Jurisdiction is also claimed by reason of diversity of citizenship (record, pp. 1, 2). The question, therefore, is whether, on the allegations of this bill of complaint, a case within the jurisdiction of the United States courts was duly presented. We are not concerned with the merits or what conclusion the court might come to on the points of law. If, on the allegations of this bill, a case was shown within the jurisdiction of the federal court, the complainant is entitled as matter of right to have its day in that court.

Statement of the case.

The bill was filed by the appellant, a corporation of the State of Illinois, against Wirt Adams, as state revenue agent, and the railroad commission of Mississippi and its clerk, all citizens of that state, and the Canton, Aberdeen and Nashville Railroad Company, a corporation of the same state, to restrain the enforcement of taxes the imposition of which was alleged to impair a contract in the charter of the last-named company exempting its property from taxation, and to be also violative of the Fourteenth Amendment.

[1] Act of August 13, 1888, 25 Stat. 434.

This charter was in the act incorporating the defendant Canton, Aberdeen and Nashville Railroad Company which was passed and became a law on February 17, 1882. Section 8 of that act was as follows:

> "That in order to encourage the investment of capital in the works which said company is hereby authorized to construct and maintain and to make certain in advance of such investment and as an inducement and consideration therefor, the taxes and burdens which this State will and will not impose thereon, it is hereby declared that said company, its stock, its railroads and appurtenances and all its property in this State necessary or incident to the full exercise of all the powers herein granted, not to include compresses and oil mills, shall be exempt from taxation for a term of twenty years from the date of approval of this act, and when the period of exemption herein prescribed shall have expired, the property of said railroad may be taxed at the same rate as other property in this State: all of said taxes to which the property of said company may be subject in this State, whether for county or State, shall be collected by the Treasurer of this State and paid into the State Treasury to be dealt with as the Legislature may direct, but said company shall be exempt from taxation by cities and towns."[1]

This charter also empowered the company to lease its railroads and other property, including immunities, for a term of years or in perpetuity (record, p. 8).

The bill set forth, among other things, the constitution of Mississippi of 1869, declaring that "the property of all corporations for pecuniary profits shall be subject to taxation, the same as that of individuals" (*id.*, p. 2), and the decision and judgment of the Supreme Court of Mississippi in the so-called "Mississippi Mills case" (*Mississippi Mills* v. *Cook*, 56 Miss. 40) rendered in 1878, wherein that court construed the provision of the constitution of 1869 already mentioned, and declared and settled the rule to be that those provisions did not require the legislature to tax the property of corporations for pecuni-

[1] Laws Mississippi, 1882, c. 554, sec. 8, p. 1069.

ary profits, and that the words "subject to" in the constitution did not mean "subjected to," but rather that said "provision is mandatory, not that the property of the corporations shall be taxed (that is left to the legislature), but such property shall ever be subject to, *i. e.*, liable to be taxed, if the legislature so wills; . . . The provision is mandatory as to universal liability to be taxed, but permissive to the legislature to tax the property of such corporations, or exempt it, as it may see proper." It was further stated that this adjudication had been followed and reaffirmed by the court in many cases since its rendition, and had become the settled law and rule of property in the state, being adopted and acted upon by the legislative, executive and judicial departments (record, pp. 5, 6).

After alleging a continued course of legislative exemption of many corporations from taxation, the bill proceeded to show that the state railroad commission had never before denied the validity of the exemption of the Canton, Aberdeen and Nashville Company, nor attempted to assess that company for taxation; and moreover, that the constitution of Mississippi, adopted in 1890, expressly provided that "exemptions from taxation to which corporations are legally entitled at the adoption of this constitution shall remain in full force and effect for the time of such exemptions *as expressed in their respective charters*, or by the general laws, unless sooner repealed by the legislature" (Constitution 1890, sec. 181); and that successive legislatures had, since the adoption of that constitution, refused to repeal exemptions contained in charters theretofore granted (*id.*, pp. 6, 7). It alleged that the complainant, "relying in good faith on the constitution and law as settled in the Mississippi Mills case aforesaid, and the practical construction of said constitution of 1869, as aforesaid,

by all the departments and officers of the said State," agreed to advance large sums of money toward building railroads in the state, if a charter exempting them from taxation for not less than twenty years were granted (record, p. 7).

The bill then alleged that, upon the faith of the foregoing interpretation of the constitution of Mississippi, the complainant "advanced the money to build and equip said Canton, Aberdeen and Nashville railroad, . . . to wit, the sum of two million five hundred and thirty-six thousand nine hundred and twenty-four dollars and thirteen cents ($2,536,924.13), and that the same was built with the money so furnished," and that a lease of the railroad so built, running to June 1, 1952, was, on March 31, 1888, executed to the complainant as authorized by the laws of the state; and that the complainant has since been and now is in possession of the property thereunder. The lease covered the railroad, franchises, immunities, etc., including the exemption from taxation. It was alleged that any assessment of the taxes would result in loss to the complainant, and that the levying of the taxes would create a paramount lien upon the property superior to the complainant's rights and "violating . . . the obligations of said charter contract, and said lease" (*id.*, pp. 8, 9).

The bill expressly alleged that the charter and exemption, the right to lease, and the lease itself were contracts rightfully made "in view of the settled law as declared," and valid under the constitution and laws of Mississippi as previously expounded, and that the obligation of these contracts was binding as against any subsequent change of judicial decision (*id.*, p. 9). It also denied the constitutional power of a subsequent legislature to compel the payment of taxes retroactively, while not denying the power of the legislature to

repeal the exemption in the charter as to future taxes (record, pp. 9, 10). Many other charters containing similar exemptions were alleged to have been granted by the legislatures of 1882, 1884 and 1888, and a uniform public policy of inviting the investment of capital in railroad building by offering an exemption from taxation was shown (*id.*, pp. 13, 14). It was alleged that the railroad in question had cost $2,536,924.13, up to June 30, 1897, that the result of its operation between the years 1889 and 1897 showed an average yearly deficit of $129,892.89, (*id.*, pp. 14, 15, 16); that no interest had been paid upon the mortgage bonds since January 1, 1889, and that no dividends had ever been paid (*id.*, p. 16).

The bill then proceeded to show the execution of a mortgage on December 1, 1884, by the Canton, Aberdeen and Nashville Railroad Company upon its railroad and franchises, including the exemption, to secure $2,000,000 of bonds which were sold to the complainant, and a subsequent mortgage securing $1,750,000 of bonds which were exchanged for a like amount of the former bonds, a note for the balance of $250,000 being secured by a subordinate mortgage. The latter bonds and the note were paid for at par, in good faith, and "as secured by a paramount lien, and in reliance upon the said sections of said charter as valid, and upon said mortgaged premises as being free from taxation for twenty years" (*id.*, pp. 17, 18).

Reference was then made to the long series of decisions of the Supreme Court of Mississippi in which the *Mississippi Mills* case had been followed[1] (*id.*, p. 19); and these decisions were alleged to have been overturned and overruled

[1] *Mississippi Mills* v. *Cook*, 56 Miss. 40, 50; *McCulloch et al.* v. *Stone*, 64 Miss. 378, 394; *V. & M. V. R. R. Co.* v. *Thomas et al.* 65 Miss. 553, 562; *Vicksburg Bank* v. *Worrell*, 67 Miss. 47, 58; *Attala County* v. *Kelly*, 68 Miss. 44; *L. N. O. & T. Ry. Co.* v. *Taylor*, 68 Miss. 361; *Railroad Co.* v. *Lambert*, 70 Miss. 779, 787.

by the decision in *Adams* v. *Yazoo and Mississippi Valley Railroad Co.*, rendered June 20, 1898 (now under consideration in No. 244 on this docket). At that time the exemption had continued sixteen years, and it now has less than two years to run. It was alleged that the state revenue agent and the railroad commission had taken steps to levy taxes against the complainant and the Canton, Aberdeen and Nashville Railroad Company for all the years since 1886; that these taxes would be certified to the various collectors who would seize the property of the complainant and parts of the railroad; that the taxes were claimed to be a lien paramount to the mortgages and the lease, and that the alleged lien of the taxes was a cloud upon the title of the complainant as lessee and as creditor (record, pp. 20, 21).

The bill specifically alleged that the acts of the defendants in creating and attempting to enforce the alleged lien for taxes were in violation of the obligation of the charter, of section 10 of Article I. of the Federal Constitution, and of the Fourteenth Amendment (*id.*, p. 21); that the subsequent general revenue laws under which the revenue agent was acting were in violation of section 10 of Article I.; and that the lien resulting from the assessment of the taxes would deprive the complainant, and also the Canton, Aberdeen and Nashville Railroad Company, and its stockholders and creditors, of property without due process of law (*id.*, p. 22). The complainant showed that it advanced the money to build the railroad, took a lease thereof for which the exemption was a material consideration, and received the bonds, in view of the provisions of the constitution of 1869 and the interpretation thereof in the *Mississippi Mills* case in 1878, and averred that its rights

could not be impaired by subsequent change in such interpretation, stating that the *Mississippi Mills* case and other cases following it had created a rule of property which could not be overturned so as to impair the complainant's rights under contracts which were valid when made (record, p. 23).

It was further alleged that many suits had been begun by counties and towns for their shares of the back taxes claimed against other companies; that a like multiplicity of suits would be instituted against the complainant for such taxes; that the county and town collectors had statutory authority to make seizures of property in order to effect summary collection; that payment under protest would only result in a multiplicity of suits to recover back the payments made; and that any remedy at law would be of doubtful utility as to the counties and towns and ineffectual as against the state (*id.*, pp. 23, 24).

The prayer of the bill was, in substance, for a decree enjoining the approval and certification of the assessment of taxes, the beginning of a multiplicity of suits for the recovery of such taxes, the taking of "any proceedings looking to the subjection of the property of your orator, or of the railroad known as the Canton, Aberdeen and Nashville railroad, to the payment of the taxes so claimed, as aforesaid, for the years 1886 to 1897, both inclusive," declaring the property of the complainant and the Canton, Aberdeen and Nashville railroad to be exempt from state and county taxation for such years, and that the charter contract of exemption be declared valid and binding; that such assessment be decreed to be null and void, and the cloud thereof removed; and for further relief (*id.*, pp. 26, 27).

Briefly summarized, the bill thus showed: a contract of exemption, to which the complainant was entitled as assignee by virtue of the lease; a settled construction of the state constitution as permitting such exemptions; the expenditure of large sums by the complainant on the strength of such construction; subsequent state tax legislation the effect of which is to impair the contract relied upon by the complainant; and sufficient grounds for the interposition of a court of equity.

The bill was filed August 5, 1898, and on the same day a writ of injunction was issued in accordance with the prayer of the bill in that behalf (record, pp. 30, 31), which was treated as a restraining order (appellee's brief on motion to dismiss, etc., p. 10). The defendants moved to discharge and quash the injunction upon seven grounds, including the following (record, p. 32):

> "1st. . . . an injunction against them," (the defendants) "or any of them is a suit against the State of Mississippi and prohibited by the 11th amendment to the Constitution of the United States.
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> . . . . . .
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> "3d. The court has no jurisdiction."

The plaintiff also moved for a temporary injunction until final hearing. Documentary evidence, including the records in *Mississippi Mills* v. *Cook*, and in *Railroad Co.* v. *Lambert*, and a copy of the decision of the Supreme Court of Mississippi in *Adams* v. *Yazoo and Mississippi Valley Railroad Company* (No. 244 on this docket), was received upon the hearing of the motions, and on February 8, 1899, the court made an interlocutory order (*id.*, p. 38), discharging the restraining order and denying the motion for an injunction. This order recited that "the court . . . finds that the complainant has shown no right to invoke the jurisdiction of this court;

and further being of opinion that this court has not jurisdiction it is therefore considered," etc., etc.

From this order the complainant prayed an appeal to the Circuit Court of Appeals for the Fifth Circuit (record, p. 39), the appeal was allowed (*id.*, p. 40), and, after hearing in that court, was dismissed for want of jurisdiction, on the ground that the federal questions appearing upon the bill of complaint were controlling in the case, and that the case therefore came within subdivision six of section five of the act of March 3, 1891, and an appeal could only be taken direct to the Supreme Court. The Circuit Court of Appeals said:

> "By the averments of the bills, nothing is left to inference as to the complainants' claims raising other constitutional questions. The gravamen of each case is that the complainant is being deprived of contract rights secured by the constitution of the United States. The claim in each case is that the complainant is entitled by contract to be exempted from paying certain taxes, and that, pursuant to statutes of the state of Mississippi passed subsequent to the charters or contracts in question, the officers of the state are proceeding to assess and collect these taxes,—and that to do this would deprive the complainant of rights secured by the constitution of the United States. * * * *The court that renders final decrees in these cases must, either directly or indirectly, decide these constitutional questions.*" *Illinois Cent. R. Co.* v. *Adams*, 93 Fed. Rep. 852, 856.

The proceedings of the Circuit Court of Appeals do not appear upon the record certified to this court by the circuit court, but the record shows the motion of the defendants to dismiss the bill, made after the dismissal of the appeal, on the ground that the appeal had been dismissed for want of jurisdiction (*id.*, p. 43). This motion was granted, and a final decree was entered by the circuit court dismissing the bill (*ib.*), from which this appeal was prayed on the ground that the "court refused jurisdiction of this cause and dismissed the bill of the com-

plainant finally for want of jurisdiction" (record, p. 44), the error assigned being that "the court erred in dismissing the bill filed by the complainant herein for want of jurisdiction to entertain the same" (*ib.*). The appeal was allowed and "granted solely upon the question of jurisdiction, this court having refused to assume jurisdiction in this cause" (*id.*, p. 45). The questions of jurisdiction in issue appear from the certificate already mentioned (*supra*, p. 1).

After the appeal to the Circuit Court of Appeals had been dismissed, but before the Circuit Court dismissed the bill of complaint, Adams brought suit in the Chancery Court for Clay County, Mississippi, for the recovery of the same taxes involved in this suit, and recovered judgment therefor. An appeal was taken to the Supreme Court of Mississippi and a full *supersedeas* bond given. This appears from the affidavits of the appellee and of Mr. Edward Mayes on file.

Specification of Errors.

The appellant asserts the following errors of the court below:

1. That the court erred in refusing to assume jurisdiction based on the diverse citizenship of the parties.
2. That the court erred in refusing to assume jurisdiction because of the lack of a federal question.
3. That the court erred in refusing to assume jurisdiction on account of the Eleventh Amendment.

I.

THE EFFECT OF THE SUBSEQUENT SUIT AND DECREE IN THE MISSISSIPPI STATE COURT.

The appellee contends that the jurisdiction of this court is ousted by the subsequent rendition of the decree in the state court for the recovery of the taxes in suit in a case brought after the commencement of this suit. This objection to the power of this court to proceed with the con-

sideration of the appeal on the merits appears to be conclusively answered by the decision rendered by this court on March 19 in *Huntington* v. *Laidley*. In that case it appeared that Laidley had, after the commencement of the suit in the United States court, obtained a judgment at law in his favor in a state court, and also a decree dismissing a bill in equity filed against him concerning the same subject matter. Notwithstanding this final judgment and final decree of the state court, this court, after determining that it had jurisdiction of the appeal, refused to consider whether the proceedings in the state court operated as a bar to the further prosecution of the suit in the federal court, Mr. Justice Gray saying:

> "Under the circumstances of this case, the question whether the proceedings in any or all of the suits, at law or in equity, in the state court, afforded a defense —either by way of *res adjudicata*, or because of any control acquired by the state court over the subject matter—to this bill in the Circuit Court of the United States, was not a question affecting the jurisdiction of that court, but was a question affecting the merits of the cause, and as such to be tried and determined by that court in the exercise of its jurisdiction. The Circuit Court of the United States cannot, by treating a question of merits as a question of jurisdiction, enable this court, upon a direct appeal on the question of jurisdiction only, to decide the question of merits, except in so far as it bears upon the question whether the court below had or had not jurisdiction of the case."

The cause was accordingly remanded in order that the circuit court might for itself determine the due effect of the proceedings in the state court.

But, beyond this, there is the question whether the subsequent decree of the state court, although duly appealed from and covered by a *supersedeas* bond, ousts this court of jurisdiction, notwithstanding that the decree in the state court may be reversed and

declared a nullity, in which event the appellant in this case would have to begin a new suit in the United States Circuit Court to obtain the same relief. This point of the effect of the judgment so appealed from and covered by a *supersedeas* bond is undoubtedly a difficult and close one. It is, however, a question which has never been decided by this court. On the contrary, in a case at the last term where the point was presented, the court found that it was not necessary to consider the authorities which hold that a perfected appeal substantially vacates or suspends the judgment below. *Hubbell* v. *United States*, 171 U. S. 203, 210.

Numerous cases were cited by the appellee on the motion to dismiss as sustaining the proposition that a judgment, although an appeal has been taken accompanied by a *supersedeas*, is yet available in support of a plea of *res adjudicata*. Many of the cases thus cited utterly fail to sustain the proposition; and authorities of great respectability may be referred to where the precise point has been ruled the other way. *Woodbury* v. *Bowman*, 13 Cal. 634; *People* v. *Treadwell*, 66 Cal. 400, and cases cited; *Spears* v. *County of Modoc*, 101 Cal. 303, 304; *Glenn* v. *Bursh*, 3 Colo. 26, 36; *Card* v. *Foot*, 57 Conn. 427, 432; *Sharon* v. *Hill*, 26 Fed. Rep. 337, 345; *Byrne* v. *Prather*, 14 La. Ann. 653; *Day* v. *De Jonge*, 66 Mich. 550; *Ketchum* v. *Thatcher*, 12 Mo. App. 185; *Haynes* v. *Ordway*, 52 N. H. 284; *Hall* v. *Calvert*, 46 S. W. Rep., 1120, 1125; *Railroad* v. *Brigam*, 95 Tenn. 624; *Texas Railway Co.* v. *Texas*, 85 Texas 605; *Cunningham* v. *Holt*, 12 Texas Civ. Ap. 150.

The effect of an appeal in admiralty has always been to suspend the sentence altogether, so that it could not be used as *res adjudicata* until the determination of the appeal. *Yeaton* v. *The United States*, 5 Cranch, 281, 283; *Souter*

v. *Baymore*, 7 Pa. St. 415, 417. See, also, *Draper* v. *Davis*, 102 U. S. 370; *Keyser* v. *Farr*, 105 U. S. 265.

Even where it has been held that a judgment from which an appeal had been taken was still available to support a plea of *res adjudicata*, it has nevertheless been conceded that such a plea could not be so used as to work an injustice, and therefore that in proper cases execution upon a judgment obtained upon such a plea would be stayed to await the event of the appeal. Durfee, C. J., said in *Paine* v. *Schenectady Insurance Co.*, 11 R. I. 411, 416:

> "We will add, however, as matter of practice, that we think the pendency of the appeal in New York may be a good ground for delaying judgment here until the appeal is disposed of; for otherwise we may give the judgment here a permanently conclusive effect, whereas in New York, if the appeal is successful, it will be conclusive only for a short time."

See, also, *Scott* v. *Pilkington*, 2 Best & Smith, 11, 41; 1 Tidd's Prac. (3d Am. Ed.) 530 *et seq.*; *Newcomb* v. *Drummond*, 4 Leigh, 58.

At any rate, is it not preferable to leave that question as to the legal effect of the judgment of the state court to be duly raised by plea and duly considered and adjudicated? Let this court decide the fundamental question of jurisdiction; and then let the appellee bring up in orderly and due form the question of law as to the point of *res adjudicata*. If the motion to dismiss should be granted on the ground now discussed, the court will have given the decree of the Chancery Court of Clay County, Mississippi, a "permanently conclusive effect," and will have ousted its own jurisdiction and that of the Circuit Court of the United States to hear and determine the cause.

We are not concerned here with the doctrine of *res adjudicata* as a matter of strict right. The motion in this

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aspect is addressed to the discretion of the court. That discretion should not be so exercised as to impair the jurisdiction unless it is perfectly clear that in no possible event can the appellant prevail upon the hearing on the merits in the court below. *Non constat* but that, by the time we are heard upon the merits of this case in the Circuit Court, the Supreme Court of Mississippi may have reversed the subsequent judgment of the state court, thus setting the alleged estoppel at large, and opening the way to appellant's ultimate success. The validity of appellant's claim to an exemption can then be settled for the future as well as for the past, and the litigation finally determined. *United States* v. *Freight Association*, 166 U. S. 290, 307.

In *Reilly* v. *Bader*, 50 Minn. 199, 203, the court refused to consider the point of *res adjudicata* upon a motion, saying: "Without questioning the correctness of counsel's position in respect to the conclusiveness, generally, of the first final judgment between the same parties and their privies, touching the same subject-matter, it is perfectly obvious that the object sought for by him cannot be attained by means of a motion. Such practice is unheard of."

II.

The jurisdiction of this court.

The appeal to this court was prayed under the first clause of section 5 of the act of March 3, 1891 (record, p. 44). The only error assigned was that "the court erred in dismissing the bill . . for want of jurisdiction to entertain the same" (*ib.*). The allowance of the appeal stated: "This appeal is granted solely upon the question of jurisdiction, this court having refused to assume jurisdiction in this cause" (*id.*, p. 45). In accordance with the

practice followed in *Shields* v. *Coleman*, 157 U. S. 168, the Circuit Court reserved to itself the determination of the question as to the portions of the record to be sent up in case counsel should not agree (record, p. 45). The certificate, which was based upon that approved in *Colvin* v. *Jacksonville*, 158 U. S. 456, 458, stated the three questions of jurisdiction involved, recited that the bill was dismissed for want of jurisdiction, and formally certified the three questions already stated (*id.*, pp. 47–49). Even without the certificate, the question of jurisdiction sufficiently appeared. *In re Lehigh Min. & M'f'g. Co. Petitioner*, 156 U. S. 322, 327; *Shields* v. *Coleman*, 157 U. S. 168, 176; *Interior Construction Co.* v. *Gibney*, 160 U. S. 217, 219; *Smith* v. *McKay*, 161 U. S. 355, 357.

If the Circuit Court was right in holding that there was no diversity of citizenship sufficient to sustain the jurisdiction, that only left the case as if no such diversity had ever been claimed. There was another independent and substantial ground of jurisdiction arising from the subject matter of the suit, namely, that the case arose under the Constitution of the United States, and the two remaining questions which have been certified are sufficient to sustain the jurisdiction of this court to entertain the appeal. Both questions go to the jurisdiction of the Circuit Court "as a court of the United States." *Blythe* v. *Hinckley*, 173 U. S. 501, 507. The second ground certified—that "the bill set forth no particular Federal question"—could relate to nothing but the jurisdiction conferred by section one of the act of August 13, 1888. The third ground certified—that the "bill was a suit against the State of Mississippi and in violation of the eleventh amendment"—related as clearly to the jurisdiction of the

court as a federal court. The language of the Eleventh Amendment is expressly directed to the "judicial power", *i. e.*, jurisdiction—power to hear and determine—of the courts of the United States.

> "The *Judicial power of the United States* shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

The Eleventh Amendment does not effect a limitation upon the jurisdiction of courts in general, but operates only upon the "judicial power" of the United States, which can be exercised through the medium and jurisdiction of the federal courts alone; and it deals with the question of power *vel non*, and not with the method of the exercise of that power. The question of jurisdiction in this respect is pre-eminently one of federal cognizance. This court very lately said, where the same point was involved: "The principal question before us is whether this suit is one of which a Circuit Court of the United States may take cognizance *consistently with the Constitution of the United States.*" *Fitts* v. *McGhee*, 172 U. S. 516, 524. The question of jurisdiction in this aspect clearly supports the appeal within the recent decision of this court in *Huntington* v. *Laidley* (decided March 19, 1900).

So far as the effect of the appeal to the Circuit Court of Appeals is concerned, it is idle to contend that the appellant had an election, after the making of the order denying the motion for an injunction *pendente lite*, whether to appeal to the Circuit Court of Appeals or to this court. The order was in no sense a final decree. It did not purport to dismiss the bill, but left the suit still pending for further proceedings. It is true that the grounds of the order denying the injunction

may have been such as to indicate that the final decree would go against the complainant; but, until that final decree was made, there was nothing on which to base an appeal to this court, and hence there could be no election. There is no question or danger of two appeals at the same time from the same decree. The Act of March 3, 1891, as amended by the Act of February 18, 1895 (28 Stat. 666), expressly provides for an appeal from such an interlocutory order as was made in this cause; and nothing in the act indicates that it was intended to cut off an appeal from a final decree when rendered. That result could only occur if the Circuit Court of Appeals should exercise any authority conferred upon it by the Act of 1895 to determine the whole case finally on an appeal from an order discharging a temporary injunction. In any event, the Circuit Court of Appeals had no jurisdiction of the only appeal taken to it; and that can hardly be said to have been an election which resulted in no hearing or adjudication upon the merits.

The entry of the final decree brought the appellant's case precisely within the first conclusion tabulated by the Chief Justice in *United States* v. *Jahn*, 155 U. S. 109, 114, as follows: "(1) If the jurisdiction of the Circuit Court is in issue and decided in favor of the defendant, as that disposes of the case, the plaintiff should have the question certified and take his appeal or writ of error directly to this court." The case is not included in any one of the other four divisions into which the subject is divided in that opinion.

But the main point is that, whatever revisory power the Circuit Court of Appeals might have exercised, and whatever form of decree it might have entered, its appellate jurisdiction was not exercised in fact, and its decision

upon the question of its own jurisdiction left the cause precisely where it was when the appeal from the interlocutory order was taken. That court said:

> "We express no opinion on the question of the jurisdiction of the circuit court, further than to say that the constitutional questions on which we base our conclusion as to the appellate jurisdiction of this court were necessarily considered in reaching a decision on the question of the jurisdiction of the circuit court. This much seems pertinent, if not necessary, in view of the fact that the interlocutory orders of the circuit court recite that, in its opinion, it was without jurisdiction of the cases. The appeals are dismissed." *Illinois Cent. R. Co.* v. *Adams*, 93 Fed. Rep. 852, 856.

It is difficult to see how the Circuit Court of Appeals could have certified any question to this court excepting that of its own jurisdiction. *Green* v. *Mills*, 25 U. S. App. 383, 392, read in connection with *Carey* v. *Houston & Texas Central Railway*, 150 U. S. 170, 181, rules that, where the federal question is not controlling, the Circuit Court of Appeals may take jurisdiction and decide the case on non-federal points. There is a radical distinction between such a case and the case at bar. Here the federal question was treated as controlling by the Circuit Court of Appeals (p. 10, *supra*). Although the Circuit Court of Appeals might have considered the entire case on the merits and rendered a final decree if it had retained jurisdiction, it did not do so, and there has been no final adjudication or decree except that rendered by the Circuit Court. Under no possible construction of acts conferring jurisdiction could this court have entertained an appeal from the interlocutory order vacating the injunction. *Kirwan* v. *Murphy*, 170 U. S. 205, 210.

The Circuit Court refused to continue the restraining order because it had no jurisdiction. The Circuit Court of Appeals declined to review this order because it in turn

had no jurisdiction, the case being one in which an appeal from the final decree should be taken exclusively to this court. In view of these two facts, there having been no decision by any court upon the merits, it is not candid to say, as was done in the motion to dismiss in this court, that the proceedings below have "left adjudged . . . every question within the appellate jurisdiction of the Court of Appeals presented by the record." Nothing has been adjudged except the lack of jurisdiction of each court. It is indeed doubtful whether a writ of *certiorari* would have been issued by this court to review the order dismissing the appeal. *In re Tampa Suburban Railroad Company*, 168 U. S. 583, 587. We do not now attack the adjudication of the Circuit Court of Appeals. On the contrary, we attempt to follow its ruling that this cause involves the application of the Federal Constitution and the validity of state laws claimed to be in contravention of the Constitution of the United States. It follows that the case is one arising under that instrument, and by reason of its subject matter is within the jurisdiction of the Circuit Court.

III.

Jurisdiction and power of the Circuit Court.

The bill of complaint presented a case clearly within the jurisdiction of the Circuit Court. The contract embodied in the charter of the Canton, Aberdeen and Nashville Railroad Company and the subsequent contract of lease between that company and the complainant were set forth, and it was specifically charged that the subsequent legislation of the state had impaired these contracts and the rights resulting therefrom (record, p. 22). This was all that was necessary to sustain the jurisdiction as

of a case arising under the Constitution of the United States.

In the recent case of *City Railway Co.* v. *Citizens' Railroad Co.* 166 U. S. 557, Mr. Justice BROWN had occasion to lay down the rule as follows (p. 562):

> "There can be no doubt that the Circuit Court had jurisdiction of the case, notwithstanding the fact that both parties are corporations and citizens of the State of Indiana. It should be borne in mind in this connection that *jurisdiction depended upon the allegations of the bill*, and not upon the facts as they subsequently turned out to be. The gravamen of the bill is that, under the act of the general assembly of 1861, and the ordinances of January 18, 1864, and April 7, 1880, the Citizens' Railroad Company had become vested with certain exclusive rights to operate a street railway in the city of Indianapolis, either in perpetuity or for the term of thirty years or thirty-seven years, which the city had attempted to impair by entering into a contract with the City Railway Company to lay and operate a railway upon the same streets.
>
> "ALL THAT IS NECESSARY TO ESTABLISH THE JURISDICTION OF THE COURT IS TO SHOW THAT THE COMPLAINANT HAD, OR CLAIMED IN GOOD FAITH TO HAVE, A CONTRACT WITH THE CITY, WHICH THE LATTER HAD ATTEMPTED TO IMPAIR. . . .
>
> "Whether the State had or had not impaired the obligation of this contract was not a question which could be properly passed upon, on a motion to dismiss, so long as the complainant claimed in its bill that it had that effect, and such claim was apparently made in good faith, and was not a frivolous one. *New Orleans* v. *New Orleans Water Co.*, 142 U. S. 79, 88."

The jurisdiction of the federal courts has been invoked in many similar cases: *New Orleans Gas Co.* v. *Louisiana Light Co.*, 115 U. S. 650; *New Orleans Water-Works Co.* v. *Rivers*, 115 U. S. 674; *Tammany Water W'rks v. N. O. Water W'rks*, 120 U. S. 64; *Hamilton Gas Light Co.* v. *Hamilton City*, 146 U. S. 258; *Walla Walla* v. *Walla Walla Water Co.* 172 U. S. 1.

In *Smyth* v. *Ames*, 169 U. S. 466, 518, Mr. Justice Harlan said:

> "These are cases of which, so far as the plaintiffs are con-

> cerned, the Circuit Court has jurisdiction * * upon the further ground that, as the statute of Nebraska under which the State Board of Transportation proceeds is assailed as being repugnant to rights secured to the plaintiffs by the Constitution of the United States, *the cases may be regarded as arising under that instrument.*"

The case being thus within the jurisdiction of the federal courts by reason of its subject matter, those courts will apply the same rules of decision as if jurisdiction were based upon diverse citizenship. Nothing is better settled than that the federal circuit courts, in the exercise of their original jurisdiction, and this court, upon appeal from their decisions, are not bound by state decisions in cases where rights have been acquired in reliance upon the law as expounded at the time by the state tribunals. No subsequent change of judicial opinion has been permitted to impair those rights. This has never been a subject of doubt in this court since the decision in *Gelpcke* v. *City of Dubuque*, 1 Wall. 175, 206, where Mr. Justice Swayne said:

> " 'The sound and true rule is, that if the contract, when made, was valid by the laws of the State as then expounded by all departments of the government, and administered in its courts of justice, its validity and obligation cannot be impaired by any subsequent action of legislation, *or decision of its courts altering the construction of the law.* The Ohio Life & Trust Co. v. Debolt, 16 Howard, 432.'
>
> " The same principle applies where there is a change of judicial decision as to the constitutional power of the legislature to enact the law. To this rule, thus enlarged, we adhere. It is the law of this court. It rests upon the plainest principles of justice. To hold otherwise would be as unjust as to hold that rights acquired under a statute may be lost by its repeal." [1]

[1] The following cases illustrate the doctrine: *Meyer* v. *The City of Muscatine*, 1 Wall. 384, 393; *Havemeyer* v. *Iowa County*, 3 Wall. 294, 303; *Mitchell* v. *Burlington*, 4 Wall. 270, 274; *Lee County* v. *Rogers*, 7 Wall. 181, 183; *Chicago* v. *Sheldon*, 9 Wall. 50, 55; *The City* v. *Lamson*, 9 Wall. 477, 485; *Olcott* v. *The Supervisors*, 16 Wall. 678, 690; *Supervisors* v. *United States*, 18 Wall.

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Jurisdiction is not, of course, claimed because of a judicial impairment of the complainant's contract rights. No such idea is entertained. But jurisdiction is claimed because a legislative impairment of those rights makes a case arising under the Constitution of the United States and within the original jurisdiction of the Circuit Courts of the United States. In administering that jurisdiction the federal courts will protect the complainant against any impairment of the rights which it has acquired in reliance upon the laws of the state as declared, although in so doing they may run counter to a subsequent change in judicial opinion. *Pease* v. *Peck*, 18 How. 595, 599; *Havemeyer* v. *Iowa County*, 3 Wall. 294, 303; *Lee County* v. *Rogers*, 7 Wall. 181, 183; *Chicago* v. *Sheldon*, 9 Wall. 50, 55; *Olcott* v. *The Supervisors*, 16 Wall. 678, 690; *Township of Pine Grove* v. *Talcott*, 19 Wall. 666, 677; *Douglass* v. *County of Pike*, 101 U. S. 677, 687; *Township of Elmwood* v. *Marcy*, 92 U. S. 289, 294.

The true and sound distinction between cases originating in the federal courts and those coming to this court on writ of error to a state court has been most clearly illustrated in the cases of *Central Land Company* v. *Laidley*, 159 U. S. 103, 111, and *Bacon* v. *Texas*, 163 U. S. 207, 221.

71, 82; *Boyce* v. *Tabb*, 18 Wall. 546, 548; *Township of Pine Grove* v. *Talcott*, 19 Wall. 666, 678; *Township of Elmwood* v. *Marcy*, 92 U. S. 289, 294; *Ober* v. *Gallagher*, 93 U. S. 199, 207; *Commissioners, etc.*, v. *Thayer*, 94 U. S. 631, 642; *Douglass* v. *County of Pike*, 101 U. S. 677, 686; *Thompson* v. *Perrine*, 103 U. S. 806, 816; *Taylor* v. *Ypsilanti*, 105 U. S. 60, 72; *Louisiana* v. *Pilsbury*, 105 U. S. 278, 294; *County of Ralls* v. *Douglass*, 105 U. S. 728, 731; *Burgess* v. *Seligman*, 107 U. S. 20, 33; *Green County* v. *Conness*, 109 U. S. 104, 105; *Carroll County* v. *Smith*, 111 U. S. 556, 562; *Anderson* v. *Santa Anna*, 116 U. S 356, 361; *Bolles* v. *Brimfield*, 120 U. S. 759, 763; *German Bank* v. *Franklin County*, 128 U. S. 526, 538; *Clark* v. *Bever*, 139 U. S. 96, 117; *Knox County* v. *Ninth National Bank*, 147 U. S. 91, 99; *Folsom* v. *Ninety Six*, 159 U. S. 611, 627; *Wade* v. *Travis County*, 174 U. S. 499, 507.

IV.

The suit is not one against a state.

The true ground of decision upon this point has been lately pronounced by this court in *Fitts* v. *McGhee*, 172 U. S. 516, where Mr. Justice Harlan, after observing (p. 525) that "what is and what is not a suit against a State has so frequently been the subject of consideration by this court that nothing of importance remains to be suggested on either side of that question," proceeded to distinguish a suit against officers of a state, as such, to restrain them from enforcing laws of the state which imposed no special duty upon them, from a suit to restrain state officers "specially charged with the execution of a state enactment alleged to be unconstitutional, but under the authority of which, it was averred, they were committing or were about to commit some specific wrong or trespass to the injury of the plaintiff's rights" (p. 529.) The opinion continues as follows (*ib.*):

> "There is a wide difference between a suit against individuals, holding official positions under a State, to prevent them, under the sanction of an unconstitutional statute, from committing by some positive act a wrong or trespass, and a suit against officers of a State merely to test the constitutionality of a state statute, in the enforcement of which those officers will act only by formal judicial proceedings in the courts of the State. In the present case, as we have said, neither of the state officers named held any special relation to the particular statute alleged to be unconstitutional. They were not expressly directed to see to its enforcement."

Herein lies a wide distinction between *Fitts* v. *McGhee* and similar cases, and the case at bar, where the statutes which are alleged to impair the obligation of the contract not only "specially charge" upon the state revenue agent the duty of enforcing their provisions, but even create the very office itself and give him a personal interest of twenty

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per cent. in all recoveries. As to the appellant, these statutes are void, and so they can confer no valid power or authority upon the incumbent of the office in respect of the appellant's property. His action, to this extent, being based upon an unconstitutional and void statute, is itself lawless, and there is ample jurisdiction to restrain him from proceedings which will cause the appellant irreparable injury by involving it in a multiplicity of suits and casting cloud upon its title. The case is within the rule laid down by this court in *Reagan* v. *Farmers' Loan & Trust Co.*, 154 U. S. 362, 388; *Scott* v. *Donald*, 165 U. S. 58, 67; and *Smyth* v. *Ames*, 169 U. S. 466, 518. The railroad commission is also specially charged, and for the first time, by the Code of 1892, with the duty of assessment, certification and revision by the same statutes which, as to the appellant, are powerless to confer any constitutional authority.[1]

It is also to be observed that, under section 3880 of the Mississippi Annotated Code of 1892, the assessment rolls were required to be so made "that each county, levee district, and municipality shall receive its just share of such taxes proportionately to the amount of property therein situated," and under the Act of February 7, 1894, creating the office of state revenue agent, that official has a "right of action" where the "state, or any county, municipality or levee board has the right of action or may sue" (Laws Mississippi, 1894, p. 29). The state was therefore not the only party in interest in collecting these

[1] In the *Virginia Coupon Cases*, 114 U. S. 270, 288, the defendant sought to substitute the State in his place under cover of unconstitutional state legislation. This court brushed the attempt aside, thus referring to the unconstitutional law:

"That, it is true, is a legislative act of the government of Virginia, but it is not a law of the State of Virginia. The State has passed no such law, for it cannot; and what it cannot do, it certainly, in contemplation of law, has not done."

taxes, its interest being comparatively small, and the counties and municipalities have the substantial interest in the subject matter. There is no constitutional inhibition preventing such suits against municipal corporations or their representatives. *Lincoln County* v. *Luning*, 133 U. S. 529.

Conclusion.

It is therefore submitted that this court has jurisdiction to entertain the appeal, and that the decree of the Circuit Court should be reversed and the cause remanded to that court for further proceedings.

Washington, October Term, 1899.

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